IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.597 OF 1984

1. Bhimabai Rambhau Kadam

2. Rambhau Vithoba Kadam,
Both residing at Junnar,
Tal : Junnar,
Dist: Pune. .. Appellants

versus

Babai Laxman Deshmane,
residing at Padali Kabadwadi,
Taluka Junnar,
Dist: Pune. .. Respondent.

Mrs. A.A.Agaral, Advocate for the Appellant.

Mr.B.P.Abhale, Advocate for the Respondent.

CORAM : A.S.OKA, J.

DATED : 16th March, 2005.

JUDGMENT :

1. On 14th December, 1984 this Court admitted the Second Appeal by passing the following order: "Admit. Hearing expedited. Substantial question of law is whether Article 64 of the Limitation Act applies or Article 65."

2. I have heard Counsel appearing for the parties on the substantial question of law framed at the time of admission of appeal. I have also heard the Counsel appearing for the parties on one more question arising in the appeal. That is regarding to the plea of adverse possession raised by the Appellants. With a view to appreciate the submissions made by the Counsel appearing for the parties it will be necessary to refer to facts of the case in brief.

3. The Appellants are the original Defendant Nos.1 and 2. Respondents are the original Plaintiffs. It is not in dispute that the suit property was of exclusive ownership of one Bhimabai Gaikwad. The Appellant No.1 and Respondent No.2 are the married daughters of Bhimabai. The Appellant No.2 is the husband of Appellant No.1 and Respondent No.1is the son of Respondent No.2. The case of the Respondents is that Bhimabai executed a registered deed of gift dated 16th May, 1962 in favour of the Respondent No.1. The case of the Respondents is that Respondent No.1 became absolute owner of the suit

property by virtue of the said deed of gift. The case made out in the plaint is that when the Respondents shifted to village Kabadwadi, the Appellants forcibly and illegally entered the suit house. Thereafter, the Appellants represented to the Respondents that since they are the close relatives of the Respondents they may be permitted to continue in possession. According to the Respondents they permitted the Appellants to occupy the suit house. When the Respondents realised that the Appellants are trying to deceive them, a notice dated 16th September, 1963 was issued by the Respondent to the Appellants calling upon them to hand over vacant possession of the suit property. Notice was replied to by the Appellants on 30th September, 1963. Therefore, suit was filed by the Respondents for possession against the Appellants on title.

4. Written statement was filed by the Appellants. The case of the Appellants is that by cancelling the gift deed executed on 16th May, 1962 executed in favour of the Respondents, Bhimabai executed a gift deed dated 20th May, 1962

in respect of 1/2 portion of the suit property in favour of the Appellant No.1. It is stated in the written statement that part of the suit property subject matter of the gift deed dated 20th May, 1962 was in exclusive possession of the Appellant No.1 and the remaining part was in possession of the Appellant No.1 and Respondent No.2 as co-owners by virtue of inheritance. It is stated that the earlier gift deed executed by Bhimabai was cancelled by her and recital to that effect is found in subsequent gift deed dated 20th May, 1962 executed by Bhimabai in favour of the Appellant No.1. It was also contended that the gift deed dated 16th May, 1962 was obtained by the Respondents by practising fraud on deceased Bhimabai. Written statement was permitted to be amended and the contention was allowed to be raised that the suit was barred by limitation as it was filed after period of 12 years from the date of execution of the gift deed.

5. The learned Trial Judge held that the Appellants have failed to prove that the gift deed in favour of Respondent No.1 was obtained from

Bhimabai by practising fraud and that the said gift deed was cancelled by Bhimabai during her lifetime. The learned Judge negatived the submissions made by the Appellants that the suit filed by the Respondents was based on prior possession and therefore Article 64 of the Limitation Act, 1963 is attracted. The learned trial Judge held that the suit will be governed by Article 65. However, the trial Court held that the possession of the Appellants became adverse from 16th May, 1962 i.e. date of execution of the gift deed in favour of the Respondent No.1 and the suit was no filed within stipulated period of 12 years from that date. It is therefore held that the suit was barred by limitation.

6. An Appeal was preferred by the Respondents to the District Court. The Appellants specifically made a statement before the Appelate Court that the first two issues framed by the trial court on the basis of contention raised by the Appellants on the two gift deeds were not pressed and it was conceded before the Appellate Court that the Respondents are the owners of the

suit house on the basis of gift deed dated 16the May, 1962. The said concession is noted by the Appellate Court in paragraph No.4 of its judgment. Therefore the Appellate Court framed only one point for determination regarding bar of limitation. The Appellate Court held that the Appellants have failed to prove that they have perfected their title by adverse possession. The Appellate Court also referred to the fact that plea of adverse possession was not raised specifically in the written statement.

7. Mrs. Agarwal, learned Counsel appearing for the Appellants submitted that on plain reading of averments made in paragraph No.4 and 5 of the written statement it is apparent that even according to the Respondents the Appellants forcibly entered the suit property and therefore admittedly possession of the Appellants was adverse to the Respondents. The learned Counsels for the Appellants further submitted that if to the knowledge of the Respondents the Appellants were in unlawful possession of the suit property, there was no requirement of specifically pleading

adverse possession. The learned Counsel further submitted that from the averments in the plaint it appears that the suit is based on the prior possession and therefore it will be governed by Article 64 and as the suit is not filed within 12 years from the date of dispossession the same is barred by limitation.

8. The learned Counsel appearing for the Respondents has supported the impugned judgment and decree passed by the Appellate Court by pointing out various findings.

9. I have considered the rival submissions, The Respondents have filed suit for possession on title as is clear from the averments made in paragraph No.2 and prayer(a) of the plaint. If the averments made in the plaint are read as a whole, it becomes expressly clear that the suit for possession filed by the Respondents is on the basis of title. Infact, in the prayer clause (a) it is prayed that the Appellants should be removed from the suit property and the Respondents should be placed in possession as owners thereof. On

plain reading of the averments made in the plaint, Article 64 will have no application as the prayer for possession is not based only on prior possession.

10. So far as the first submission of the learned Counsel for the Appellant on plea of adverse possession is concerned, it cannot be disputed that there has to be a factual foundation in the pleading for plea of adverse possession and there has to be assertion of hostile possession to the knowledge of the real owner. As the suit is governed by Article 65 of the Limitation Act, 1963, the suit ought to have been filed within the period of 12 years from the date on which possession of the Appellants became adverse. The perusal of written statement shows that there is no specific contention raised as far as adverse possession is concerned. By amending the written statement it is contended that the suit is not within limitation as it is not filed within the period of 12 years from the date of execution of the gift deed in favour of Respondent No.1. There is no assertion of hostile title in the written

statement. After referring to the written statement the learned Appellate Court has recorded a finding that there is no plea of adverse possession raised by the Appellant in the written statement. The Appellate Court held, and in my opinion rightly, that there ought to have been foundation in the pleadings to the plea on adverse possession. In September 1963 the Respondents issued notice to the Appellants to hand over vacant possession of the suit property. On 30th September, 1963 a reply was given to the said notice by the Appellants which is at Exhibit 48 in the trial Court. In the said reply a contention is raised that during the lifetime of the mother Bhimabai, she divided the suit house into two parts and accordingly possession of one part was given to the Appellants. There is no assertion whatsoever of hostile title. On the contrary it is claimed that the possession of the Appellants was referable to lawful title conferred on the Appellants by virtue of the partition effected by deceased Bhimabai during her lifetime. Therefore, the plea in reply dated 30th September, 1963 is that the possession of the Appellants is referable

to lawful title. Thus, it is very clear that atleast till 30th September, 1963 there was no assertion of hostile title by the Appellants. Suit is filed by the Respondents on 15th June, 1974. It is, therefore, obvious that bar of limitation will not be attracted at all as held by the Appellate Court.

11. In so far as revocation or cancellation of the gift deed dated 16th May, 1962 is concerned, in view of Section 126 of the transfer of Property Act, 1882 the said gift deed could not have been revoked.

12. In this view of the matter there is no error in the finding recorded by the Appellate Court. Therefore, the Second Appeal is dismissed with no order as to costs.

(A.S.OKA, J.)